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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 192

WILLIAM LLOYD BARNARD, JOHN W. DAILEY, CHARLES W. HUMPHREY, DONALD HENRY SMALLIGAN, PETER JOHN SMEDES and ROY HENRY STORES, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

JOHN W. DAILEY, ROBERT E. LUKENS and JAMES F. BOGUE, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

WILLIAM LLOYD BARNARD, WALTER H. MORSE and HOMER A. KELLEY, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

DONALD HENRY SMALLIGAN, PETER JOHN SMEDES and WILLIAM LLOYD BARNARD, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners in the above described consolidated cases, by their attorneys, respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in these causes on May 2, 1958.

OPINIONS BELOW.

The United States District Court for the District of Kansas sustained motions to dismiss the indictments against petitioners without opinion on August 26, 1957. After appeal by the United States, the various cases were consolidated by order of the Court of Appeals January 9, 1958. The opinion of the Court of Appeals has not yet been reported, but appears in the record on Certiorari at pages 4 to 19,[1] and a printed copy thereof is appended to this petition. No opinion was rendered by the Court of Appeals in denying the Petition for Rehearing.

JURISDICTION.

The judgment of the Court of Appeals for the Tenth Circuit sought to be reviewed, was dated May 2, 1958, and entered on the same date (R. 20). Petition for rehearing was denied on May 23, 1958 (R. 26). Time within which to file petition for certiorari was extended by this Court on June 22 to July 22, 1958.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Does a "cost-reimbursable" contract under the anti-kickback statute include a contract which provides for the payment of a unit price and which does not require that the government reimburse costs?

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[1]Certified record on certiorari is hereinafter referred to and identified as "R." Certified copy of the record printed for use in the Court of Appeals is hereinafter referred to and identified as "PR."

2. Does the Code of Federal Regulations have the force of law to define or limit the provisions of a contract for military aircraft between the United States and a prime contractor, and determine whether it is cost-reimbursable or a fixed-fee contract, and does the Code so limit the negotiating authority of contracting officers?

3. May an accused be charged and convicted of the crime of conspiracy to violate the anti-kickback statute without allegation and proof that he knew that the contractual relationship between the prime contractor and the government was a prohibited one under the statutes?

STATUTES INVOLVED.

Title 41, U.S.C. 151-162 (now Title 10, Sec. 2301-2314), the pertinent parts of which are set out in Appendix B. 32 Code of Federal Regulations 3.403, 3.404, 1.400, 1.403(a) (Appendix C).

R.S. 161, 5 U.S.C. 22, 62 Stat. 21, Sec. 638, 66 Stat. 537, gives Secretary of Defense authority to promulgate regulations to govern procurement, and are not reproduced verbatim herein.

STATEMENT OF CASE.

The District Court dismissed the indictments in these cases. The judgment which this Court is now asked to review is that of the Tenth Circuit Court of Appeals reversing the District Court judgment and remanding the cases.

The indictments (PR. 1-7, 105-108, 117-120, 129-130) are founded on alleged violations of Title 41, U. S. C., Sections 51, 52, and 54, commonly called the Anti-Kickback

Statute (Appendix B). In general it prohibits the giving of gifts or gratuities by subcontractors to employees of a prime contractor having a contract with the United States, when such prime contract is on a *"Cost-plus-a-fixed-fee, or other cost reimbursable basis."*

In the indictments it is alleged that the contract in question, AF 33(038)-18503, is a "fixed price reimbursable" contract.[1] The pertinent portions of this contract are reproduced in the record which was printed for the use of the court below (PR. 9-94). In order that the District Court could determine whether the prime contract in question was of the type contemplated by the statute, it was, by agreement of the parties, submitted to the Court prior to its ruling on the motions to dismiss.

It is a contract between the United States Air Force and General Motors Corporation. Some of the defendants are subcontractors who furnished supplies (tools) to General Motors and are charged with giving gifts and gratuities to certain employees of General Motors, the employees being the other defendants.

The Air Force contract is designated throughout as a "Fixed Price Contract." (For example, PR. 57, 61, 65, 69, 87). It is classified under the Code of Federal Regulations as a type of "fixed-price" contract (appendix C). The indictments call it a "fixed price reimbursable" contract (PR. 2, 97, 106, 118). Furthermore, until recently released, it carried a "Restricted" security classification (PR. 9).

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[1]Contract No. AF 33(038)-18504 is not in issue here, as it is agreed by the Government that defendants were in no way connected with the performance of that contract. However, note that the indictments refer to it, in the language of the statute, as "cost reimbursable", whereas they refer to the contract with which defendants *were* concerned as "fixed price reimbursable", which is *not* covered by the statute (PR. 2, 97, 106, 118).

Of course, none of the defendants was a party to said contract. It provides for a retrospective renegotiation of prices after the completion of the first 71 airplanes built. The Air Force is not *required* by the terms of the contract to reimburse General Motors for its costs. It only permits the consideration of costs, along with all other data usually considered in negotiating prices *under a new contract* (PR. 32).

Whether it be the original price, or a renegotiated price, it is a price of so much *per unit*, under the terms of the contract, and is not controlled by the amount of the contractor's costs.

Lastly, nowhere do the indictments charge that the defendants had any knowledge that the contract between General Motors and the Air Force was of the "cost-reimbursable" type so as to render criminal the practice of giving gratuities in the hope of obtaining contracts.

The opinion of the Tenth Circuit Court of Appeals (appendix A) holds that it is not necessary to charge that defendants had knowledge of the nature of the prime contract; that, despite the fact that the parties to the prime contract designated it a fixed price contract, and despite the fact that the Code of Regulations define it as such, it in fact "partakes" of the characteristics of *both* a fixed price and a cost reimbursable contract—and that defendants must stand trial.

REASONS RELIED ON FOR GRANTING THE WRIT.

I.

The Tenth Circuit Court of Appeals has decided an important question of Federal defense contract law and regulation, not yet decided by this Court, which decision is in conflict with decisions of other circuits, and with Acts of Congress and Executive Regulation, as well as the contract itself.

1. The Tenth Circuit Court of Appeals has in this matter decided an important question of Federal law which has not yet been settled by this Court, and which is in disagreement with the decision reached by District Courts in other circuits as well as with the duly adopted regulations of the Defense Department. A decision by this Court would end any inconsistencies or ambiguities existing and introduce certainty into the interpretation of government contracts for war materiel, and in defining the area of authority of contracting officers, and their power to bind the government. An answer would relieve the government of any uncertainty as to its position in billions of dollars worth of contract liability with which it must deal in providing for national defense and other purposes. A failure to provide an answer might mean a great and otherwise unnecessary increase in the expense of the defense establishment and would also increase the uncertainties of the citizen who deals with the government, in knowing whether he has a valid contract and can rely on the Federal Regulation, or is at the mercy of some oversight by the government representative, over whose decisions he has no control. The effect of the decision of the Circuit Court is to strike down the Code of Federal Regulations promulgated by the Defense Department under authority of the Acts of Congress,

now Title 10, U. S. C. A. 2301-2314, which prescribes the form and limitations of the various contracts for defense materials and establishes the methods of procurement of these supplies.

The decision of the Court of Appeals, in question, reached an incorrect conclusion entirely contrary to the intent of Congress and of the Regulations. It has long been the rule that regulations adopted by an executive department under legislative authority have all the force of law, as this Court declared in *Commissioner of Internal Revenue* v. *Wheeler*, 65 S. Ct. 799, 324 U.S. 542. The opinion below is inconsistent with the Wheeler decision, and also with the decision in *Sheridan-Wyoming Coal Co.* v. *Krug*, 172 F.2d 282, and with the decision of the Second Circuit in *Hewitt* v. *Speyer*, 250 Fed. 367, 162 C. C. A. 437.

The United States is bound in contract only when the contract is adopted pursuant to the applicable provisions of statute authorizing the activity or expenditure, and a governmental representative has no carte blanche to bind the government he represents to any contract he may see fit to negotiate. *The Court of Appeals has stated (Opinion page 17) that the Regulation is valid for civil purposes but not criminal.* There is an obvious inconsistency here that this Court should correct, else the Regulation means "fixed price" for all purposes of contract negotiation and civil performance, and "cost reimbursable" for criminal purposes. The words should mean the same in either situation, and the contracting party which is conducting this prosecution has already declared the definition of this as a "fixed price" contract. Further, Section 51, Title 41, U. S. C. A., does not repeal the Regulation. Consequently, the Court of Appeals has erred here.

The regulations and the law are a part of the contract for all purposes and there is no conflict between

the civil and the criminal phases. Section 51, Title 41, simply operates on the contract situation as it is determined under the regulations and statutes. The inconsistency created by the Court of Appeals should be eliminated.

2. In holding that the contract is both a "cost reimbursable" and a "*fixed price*" contract, the Court of Appeals has again introduced an element of inconsistency and confusion into the field of government contract law which this Court has not yet passed upon, but which this Court could clarify by a decision. The contract itself is everywhere marked and designated a "fixed price" contract (PR. 42) (PR. 43) (PR. 57) (PR. 61) and further contains these restrictions (P.R. 32, 33):

> (d) Negotiations.—(1) Upon the filing of the statements and data required by paragraph (c) of this Clause, the Contractor and the Contracting Officer will negotiate promptly in good faith to agree upon prices for items *to be delivered* on and after the effective date of the price revision. Negotiations for price revisions under this Clause shall be conducted on the same basis, employing the same types of data (including, without limitations, comparative prices, comparative costs, and trends thereof) as in the negotiation of prices under a New Department of the Air Force contract.
>
> (2) After each negotiation the agreement reached will be evidenced by a supplemental agreement stating the revised prices to be effective with respect to deliveries *on and after the effective date of the price revision* (or such other later date as the parties may fix in such supplemental agreement).

Furthermore, the decision below is in conflict with the decision of the Second Circuit in *Symington Co.* v. *C. I. R.*, 33 F. 2d 372, upholding the petitioners' contention in this matter. Nowhere in the contract is there any formula ex-

pressed for the determination of any margin of profit to the prime contractor, nor is there any provision requiring reimbursement to the prime contractor of its cost, but it requires only that the parties negotiate.

The trial court in these cases was of the opinion that the matter should be dismissed. The United States District Court for the Eastern District of Pennsylvania in an unreported opinion in United States of America against James Samuel Morris *et al.*, 18535, dismissed a case and discharged the defendants, where the contract was identical to the one in the case at bar. The Court ordered a copy of his remarks transmitted to the Attorney General of the United States in the event that he wished to approach Congress on the subject of changing the law to include this particular type of contract.

II.

The opinion below, in holding that the indictments were sufficient even though they failed to allege knowledge by defendants of the nature of the prime contract, conflicts with prior decisions of this court and with opinions of other circuits.

The decision below should be reviewed because it upholds the sufficiency of the indictments even though they fail to allege, and thus eliminate the necessity of proof, that the defendants tendered or received the alleged gratuities prohibited under Section 61, Title 41, U.S.C., *knowing that General Motors was a prime contractor with a department of the United States on a cost-plus-a-fixed-fee or other cost-reimbursable basis.*

In so holding, the Tenth Circuit Court of Appeals followed without additional reasoning the opinion of the Eighth Circuit in *Hanis* v. *United States*, 246 F.2d 781, and

thus perpetuated a dangerous concept of the requirements of "guilty knowledge" necessary to convict, going far beyond boundaries heretofore established.

The decision below in this regard is irreconcilably in conflict with the prior decisions of this court in *United States* v. *Cruikshank*, 92 U.S. 542, 23 L. Ed. 588; *United States* v. *Carll*, 105 U.S. 611, 26 L. Ed. 1135; *Pettibone* v. *United States*, 148 U.S. 147, 13 S. Ct. 542, 37 L. Ed. 419; *Automatic Canteen Company of America* v. *Federal Trade Commission*, 346 U.S. 61, 73 S. Ct. 1017, 97 L. Ed. 1454, and *Morisette* v. *United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288. Furthermore, the opinion below and the opinion of the Eighth Circuit in *Hanis* v. *United States, supra*, also conflict with the opinion of the Fifth Circuit Court of Appeals in *United States* v. *Twelve Miami Digger Slot Machines*, 213 F.2d 918, the Court of Appeals of District of Columbia in *Moens* v. *United States*, 267 Fed. 317, and the Ninth Circuit in *Crank* v. *United States*, 61 F.2d 620. In fact, the opinions in the court below and in the Hanis case cannot be reconciled with the prior Eighth Circuit opinion in *St. Joseph Stockyards* v. *United States*, 187 Fed. 104.

The indictments uniformly allege that the various defendants knowingly conspired to violate the provisions of the "anti-kickback" statute (PR. 1, 5, 6, 105, 117, 119, 120, 129). The indictments then recite that General Motors Corporation was a prime contractor with the United States under a "fixed price reimbursable contract with a price redetermination clause." Continuing, the indictments charge that defendants, either as suppliers of General Motors or as employees of General Motors paid or received various gifts or compensation for the purpose of obtaining and procuring the award of subcontracts.

At no place do the indictments further charge that the defendants gave or received the alleged gifts *knowing that*

General Motors was a prime contractor with the United States under a cost-plus or cost-reimbursable contract.

If the Court of Appeals decision is permitted to stand, these defendants may be convicted of a serious felony offense punishable by penitentiary sentence up to ten years and never have had any knowledge or notice that their activities were prohibited.

The practice of showering favors on purchasing agents with hope of obtaining orders is perfectly acceptable in private industry and is likewise lawful where the prime contractor is supplying the United States, so long as the contract between the two is not a cost-plus-a-fixed-fee contract or other cost-reimbursable contract. It is the existence of this type contract which makes criminal a practice otherwise neither *malum prohibitum* or *malum in se*. Thus, it is an essential element of intent or *mens rea* that the accused be charged with, and the proof disclose, knowledge of the existence and character of the prime contract with the United States so as to put him on notice that the practice, otherwise lawful, is a crime.

The failure of the Tenth Circuit Court of Appeals below or the Eighth Circuit in *Hanis* v. *United States, supra,* to require the allegation and proof of guilty knowledge as required by the express language of Section 54 is contrary to the opinion of this court in *Morisette* v. *United States, supra.* In that case it was charged that defendant "did unlawfully, wilfully and knowingly steal and convert" property of the United States. The evidence disclosed that the defendant had taken shell casings from a tract of uninhabited land upon which the government had established a bombing range, which he discovered while hunting deer and which he believed to be abandoned. This court held that a "knowing conversion" as required by the statute required more than mere knowledge that the defendant was

taking the property into his possession. "He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion." (l.c. 271).

Since fundamental principles of liberty are at stake, it is important that this court review the decision below so as to guide the policies of the multitude of businessmen engaged either directly or indirectly in the vast governmental spending program. Particularly is this true when, as here, the decision sought to be reviewed is so repugnant to the historical concept of justice and fair play as to permit conviction and imprisonment of men who have no knowledge of the facts which make criminal their engaging in practices that are accepted throughout private industry and lawful even where the government is the ultimate purchaser, except in the limited instances where the contract between the prime contractor and the government is on a cost-plus-a-fixed-fee or other cost-reimbursable basis.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

MARCH TERM—1958.

UNITED STATES OF AMERICA, *Appellant,* vs. WILLIAM LLOYD BARNARD, JOHN W. DAILEY, CHARLES W. HUMPHREY, DONALD HENRY SMALLIGAN, PETER JOHN SMEDES and ROY HENRY STOUT, *Appellees.*	**Number 5786.**
UNITED STATES OF AMERICA, *Appellant,* vs. JOHN W. DAILEY, ROBERT E. LUKENS, and JAMES F. BOGUE, *Appellees.*	**Number 5787.**
UNITED STATES OF AMERICA, *Appellant,* vs. WILLIAM LLOYD BARNARD, WALTON H. MORSE, and HOMER A. KELLEY, *Appellees.*	**Number 5788.**
UNITED STATES OF AMERICA, *Appellant,* vs. DONALD HENRY SMALLIGAN, PETER JOHN SMEDES, and WILLIAM LLOYD BARNARD, *Appellees.*	**Number 5789.**

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Milton P. Beach, Assistant United States Attorney (William C. Farmer, United States Attorney, was with him on the brief), for Appellant.

J. A. Dickinson and Patrick J. Warnick (David Prager, William W. Dimmitt, Jr., Sam A. Crow, Donald C. Little, Alvin C. Randall, Edwin Earnshaw, Roscoe C. Van Valkenburgh, James E. Lockwood, Arn & Mullins, and Joseph H. McDowell were with them on the brief), for Appellees.

Before BRATTON, Chief Judge, and HUXMAN and MURRAH, Circuit Judges.

BRATTON, Chief Judge:

These four criminal cases present for determination questions of law common to all of them and therefore the cases may be considered together.

In the first case, William Lloyd Barnard, John W. Dailey, Charles W. Humphrey, Donald Henry Smalligan, Peter John Smedes, and Roy Henry Stout were defendants; in the second case, John W. Dailey, Robert E. Lukens, and James F. Bogue were defendants; in the third case, William Lloyd Barnard, Walton H. Morse, and Homer A. Kelley were defendants; in the fourth case, Donald Henry Smalligan, Peter John Smedes, and William Lloyd Barnard were defendants; and for convenience, reference will be made to the several defendants as Barnard, Dailey, Humphrey, Smalligan, Smedes, Stout, Lukens, Bogue, Morse, and Kelley, respectively.

The indictment in the first case contained five counts. The first count charged that all of the defendants in that case entered into a conspiracy to violate Sections 51, 52, and 54, Title 41, United States Code, in the manner and by the means therein set forth. This was the manner and these were the means set forth in the count. General Motors Corporation was the prime contractor with the United States Air Force under a fixed price reimbursable contract with a price redetermination clause for the furnishing of airplanes. The prime contract was supplemented by a special facilities contract providing for cost reimbursement for the tools and equipment necessary to perform the contract to build airplanes. Barnard was employed by General Motors as head tool buyer, in which capacity he administered subcontracts and purchase orders awarded to other manufacturers and suppliers for the purchase of tools, equipment, and materials to be used in completing and furnishing the airplanes under the prime contract. Dailey was employed by General Motors as a tool buyer; later he became head tool buyer; and in such capacities, respectively, he administered subcontracts and purchase orders awarded to other manufacturers and suppliers for the purchase of tools, equipment, and materials to be used in completing and furnishing airplanes under the prime contract. Stout was an employee of General Motors. He resigned such position and became one of the owners of Plastic Tooling, Inc., a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of airplanes under the prime contract. Smalligan and Smedes were the owners of Tri-Arts Industries, Inc.; and after a specified date, Smalligan, Smedes, and Stout became the owners of Plastic Tooling, Inc., each of which firms was a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of airplanes under the prime con-

tract. Humphrey was one of the owners or officers of Summit Engineering Company, a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of airplanes under the prime contract. Stout was one of the owners of Magic Circle Tool Engineering Company, a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of airplanes under the prime contract. And it was the plan and purpose of the conspiracy that Barnard and Dailey would accept payments of fees, commissions, gifts, gratuities, and compensations paid by Humphrey, Smalligan, Smedes, and Stout as inducements for the aid and assistance of Barnard and Dailey in obtaining and procuring the award of purchase orders and subcontracts in favor of the firms mentioned in the indictment.

The second count charged that Smalligan, Smedes, and Stout, knowingly and unlawfully on behalf of a subcontractor, gave to Dailey, an officer, employee, and agent of a prime contractor holding a contract entered into by a department, agency, and establishment of the United States for the furnishing of supplies, equipment, materials, and services on a cost reimbursement basis, and Dailey, knowingly and unlawfully received, an automatic clothes washer and a clothes drier, as an inducement for the awarding of subcontracts or orders from the prime contractor and as an acknowledgment of subcontracts and orders previously awarded. The third count charged that Smalligan and Smedes, on behalf of a subcontractor, knowingly and unlawfully, gave to Barnard, an officer, employee, and agent of a prime contractor holding a contract entered into by a department, agency, and establishment of the United States for the furnishing of supplies, equipment, materials, and services on a cost reimbursement basis, and Barnard, knowingly and unlawfully received, the sum of $3,004.20 as an

inducement for the awarding of subcontracts or orders from the prime contractor and as an acknowledgment of subcontracts and orders previously awarded. The fourth count charged that Stout, on behalf of a subcontractor, knowingly and unlawfully gave to Dailey, an officer, employee, or agent of a prime contractor holding a contract entered into by a department, agency, and establishment of the United States, and Dailey, knowingly and unlawfully received, an automatic dishwasher of the value of $260 as an inducement for the awarding of subcontracts or orders from the prime contractor and as an acknowledgment of subcontracts and orders previously awarded. And the fifth count charged that Stout, on behalf of a subcontractor, kn ingly and unlawfully, gave to Dailey, an officer, employee, or agent of a prime contractor holding a contract entered into by a department, agency, and establishment of the United States for the furnishing of supplies, equipment, materials, and services on a cost reimbursement basis, and Dailey, knowingly and unlawfully received, $610 as an inducement for the awarding of subcontracts or orders from the prime contractor and as an acknowledgment of subcontracts and orders previously awarded.

The indictment in the second case contained only one count. It charged that Dailey, Lukens, and Bogue conspired to violate Sections 51, 52, and 54, *supra*. The substance of the conspiracy as pleaded was that General Motors entered into the contract with the Air Force to furnish the airplanes; that Dailey was employed by General Motors as a tool buyer; that in such capacity he administered subcontracts and purchase orders awarded to other manufacturers and suppliers for the purchase of tools, equipment, and materials to be used in completing and furnishing the airplanes; that Lukens was president and Bogue was sales manager of Lukens Aluminum Corporation, and Lacorp

Machine Tool Company; that each firm was a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of airplanes under the contract; that Lukens and Bogue, on behalf of Lukens Aluminum Corporation and Lacorp Machine and Tool Company, solicited and received orders to furnish tools, equipment, and materials to General Motors; and that it was the plan and purpose that Dailey would accept from Lukens and Morse payments of fees, commissions, gifts, gratuities, and compensations as an inducement for the aid and assistance of Dailey in obtaining and procuring the award of purchase orders and subcontracts in favor of Lukens Aluminum Corporation and Lacorp Machine and Tool Company.

The indictment in the third case contained three counts. The first count charged that Barnard, Morse, and Kelley conspired to violate Sections 51, 52, and 54, *supra*. The substance of the conspiracy as pleaded was that General Motors and the Air Force entered into the contract for the furnishing of airplanes; that Barnard was employed by General Motors as tool buyer, in which capacity he administered subcontracts and purchase orders awarded to other manufacturers and suppliers for the purchase of tools, equipment, and materials to be used in completing and furnishing the airplanes; that Morse and Kelley were partners in the Mead Manufacturing Company, a manufacturer and supplier of tools, equipment, and materials to General Motors which were used in the manufacture of the airplanes; that Morse and Kelley, on behalf of Mead Manufacturing Company, solicited orders to furnish tools, equipment, and materials to General Motors and received orders which orders were produced and supplied; and that it was the plan and purpose that Barnard would accept payments of fees, commissions, gifts, gratuities, and

compensations paid by Morse and Kelley as an inducement for his aid and assistance in obtaining and procuring the award of purchase orders and subcontracts in favor of Mead Manufacturing Company. The second count charged that Morse and Kelley, on behalf of a subcontractor, knowingly and unlawfully paid to Barnard, an officer, employee, and agent of a prime contractor for the furnishing of supplies, materials, equipment, and services on a cost reimbursable basis, and Barnard, knowingly and unlawfully received from Morse and Kelley, the sum of $587 as an inducement for the award of subcontracts or orders from the prime contractor and as an acknowledgment of subcontracts or orders previously awarded. And the third count charged that Morse and Kelley knowingly and unlawfully paid to Barnard, and Barnard knowingly and unlawfully received from Morse and Kelley, $522 as an inducement for the award of subcontracts or orders and as acknowledgment of subcontracts and orders previously awarded.

And the indictment in the fourth case contained a single count. It charged that Smalligan and Smedes, on behalf of a subcontractor, knowingly and unlawfully gave to Barnard, formerly an officer, employee, and agent of a prime contractor holding a contract entered into by a department, agency, and establishment of the United States for the furnishing of supplies, equipment, and materials, and services on a cost reimbursement basis, and Barnard, knowingly and unlawfully received the sum of $3,004.20 as an acknowledgment of subcontracts and orders awarded during the time Barnard was acting as such officer, employee, and agent.

Motions were filed to dismiss the several indictments. The substance of the motions in the first, second, and third cases was in each instance that the indictment failed

to state facts sufficient to constitute an offense against the United States; that the indictment was fatally defective for failure to allege the existence of a "cost-plus-a-fixed-fee or other cost reimbursable basis" contract; and that upon production and examination, the contract disclosed upon its face that it was a "fixed price" contract and not a "cost-plus-a-fixed-fee or other cost reimbursable basis" contract. The motion to dismiss the indictment in the fourth case is not in the record before us. The motions were sustained; the indictments were dismissed; and the United States appealed.

Sections 51, 52, and 54, supra, relate to kickbacks on Government contracts. Section 51 forbids the payment of any fee, commission, or compensation of any kind, or the granting of any gift or gratuity of any kind, directly or indirectly, by or on behalf of a subcontractor, as defined in section 52, to any officer, partner, employee, or other agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment, or services of any kind on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contractor, or to any such subcontractor, either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded. Section 52 defines the term "subcontractor" for the purposes of sections 51-54. And section 54 provides that any person who shall knowingly, directly, or indirectly, make or receive any such prohibited payment shall be punished as therein specified. Considered together, these statutes are penal in character and should therefore

be construed strictly. They cannot be enlarged by implication or intendment beyond the fair meaning of the language used. But the object of all construction, whether of penal or other statutes, is to ascertain the legislative intent. And the rule of strict construction does not require that a penal statute be strained or distorted in order to exclude from its reach acts or conduct which the legislative body intended to bring within its scope. The exactions of the rule are met in full measure if the language is given its fair meaning in accordance with the obvious intent of the legislative body. Osaka Shosen Kaisha Line v. United States, 300 U.S. 98; United States v. Raynor, 302 U.S. 540, 552; United States v. Alpers, 338 U.S. 680.

Section 51, supra, is limited in reach to kickbacks given and received in connection with contracts on a cost-plus-a-fixed-fee or other cost reimbursable basis. And therefore unless the prime contract awarded to General Motors was of that kind, the indictments were fatally infirm and were providently dismissed. In a document or certificate seemingly issued in connection with a letter contract which preceded the execution of the formal prime contract, it was stated in substance that a fixed price contract was contemplated. The prime contract contained several references to it being a fixed price contract. Several supplements were designated as supplemental agreements to fixed price contract. And the prime contract provided in each instance specified unit prices for various units of aircraft and parts produced. But it did not provide that it was intended or understood to be a fixed price contract. And it provided for redetermination of prices, both prospectively and retrospectively. It provided that upon the acceptance of the seventy-first airplane, the parties should negotiate to revise the prices of all items theretofore or thereafter delivered. It further provided that after acceptance of the

two hundred and ninety-ninth airplane, the parties should negotiate to revise the prices of all items thereafter to be delivered. It further provided that the contractor should submit to the contracting officer accounting data for consideration in connection with negotiations looking toward the revision in prices. It further provided that the parties should negotiate promptly and in good faith. And it further provided that after each negotiation, the agreement reached should be evidenced by a supplemental agreement stating the revised prices to be effective with respect to deliveries on and after the effective date of the price revision. No limitation was fixed upon the range of redetermination or revision of prices, upward or downward. No ceiling or floor was specified beyond which the revised or redetermined prices could not go. The provision that upon the acceptance of the seventy-first airplane, the parties should negotiate in good faith respecting the prices of all items theretofore or thereafter delivered reasonably and impliedly contemplated that instances could and perhaps would arise in the course of fixing revised prices for items theretofore delivered which would involve reimbursement of the prime contractor for costs incurred. In other words, the provision reasonably contemplated that in the course of renegotiation and revision in prices for items theretofore delivered, reimbursement for costs incurred would be made in some instances. Not only did the provision contemplate reimbursement for costs in some instances, but the expressed obligation resting upon the Government to negotiate in good faith respecting revisions in price for items theretofore furnished impliedly required the Government to reimburse the prime contractor for costs incurred when the facts justified reimbursement. When all of the provisions in the contract are considered together as constitutent parts of a harmonious whole, it cannot be said

that the contract was exclusively a fixed price contract as distinguished from a cost reimbursable basis contract. It partook of both aspects. It was in substance and effect a fixed price and "other reimbursable basis contract". And partaking in part of an "other reimbursable basis contract", it came within the range of section 51, supra.

Reliance is placed upon regulation 3.403-3, 32 C.F.R. §3.403-3, promulgated by the Secretary of Defense to place or classify the prime contract awarded to General Motors in the class of a fixed price type of contract and therefore outside the purview of section 51, supra. It is the well settled rule of law that a regulation promulgated by an administrative agency charged with the administration of an act has the force and effect of law if it is reasonably adapted to the administration and enforcement of the act and does not contravene some statutory provision. Maryland Casualty Co. v. United States, 251 U.S. 342; United States v. Stanolind Crude Oil Purchasing Co., 113 F.2d 194. But the regulation referred to was one of comprehensive general regulations promulgated for the purpose of establishing and promoting uniform policies and procedures relating to the procurement of supplies and services under the authority of the Armed Services Procurement Act of 1947, 62 Stat. 21, as amended. It was not promulgated under section 51, supra. It is completely unrelated to the statute. And therefore it is without probative effect here.

The indictments did not charge that the donors or recipients of the kickbacks knew of the existence of the fixed price cost reimbursable basis contract between General Motors and the Air Force. Section 51, supra, forbids the "knowingly" giving or receiving of kickbacks. And the indictments charged the "knowingly" giving and receiving of the kickbacks therein referred to. But the

statute does not limit its application to persons having knowledge of the nature of the prime contract. In other words, the statute does not make knowledge of the terms of the prime contract an essential element of the offense to be charged in the indictment. Hanis v. **United States**, 246 F.2d 781.

The judgments are severally reversed and the causes are remanded with directions to deny the motions to dismiss the indictments.

APPENDIX B.

Title 41, U.S.C., Section 51:

"The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever, on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by set-off of moneys otherwise owing to the subcontractor either directly by the United States, or by a prime contractor under any cost-plus-a-fixed-fee or cost reimbursable contract, or by an action in an appropriate court of the United States * * *."

Section 54:

"Any person who shall knowingly, directly or indirectly make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both."

APPENDIX C.

Code of Federal Regulations, Title 32.

Sec. 3.403 Types of Contracts.—*Fixed-Price type of contract.*

3.403.1 Firm fixed price contract.

3.403-2 Fixed price with escalation clause.

3.403-3 Fixed price contract providing for the redetermination of price. Under this type of fixed price contract five types of redetermination are provided.

(1) Prospective periodic price redetermination at stated intervals.

(2) Prospective price redetermination on request.

(3) Retroactive and prospective price redeterminations at a stated time prior to completion.

(4) Retroactive and prospective price redeterminations including further prospective redetermination on request.

(5) Retroactive price redetermination after completion.

3.403-4 Fixed price incentive contract.

The regulations then proceed to provide for cost-reimbursement type contract under 3.404, entitled "Cost reimbursement type contracts," under which three types of contracts are listed as follows:

Sec. 3.404 Cost reimbursement contracts.

3.404-1 Cost contract.

3.404-2 Cost sharing contract.

3.404-3 Cost-plus-a-fixed-fee contract.